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Supreme Court, U.S.
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No. 08-524

In The

Supreme Court of the United States

JOE DIAZ,

Petitioner,

v.

STATE OF CALIFORNIA,

Respondent.

On Petition for Writ of Certiorari to the Court of Appeal of California, Second Appellate District, Division Eight

PETITION FOR WRIT OF CERTIORARI

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October 17, 2008

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QUESTIONS PRESENTED

1. Do the police violate the Fourth Amendment to the United States Constitution when they search a privately owned vehicle parked in a private driveway of a private residence owned by the defendant without benefit of a search warrant, without consent, and without exigent circumstances?

2. Does the State of California violate the Second Amendment by making the possession of a gun by a felon a crime? See District of Columbia v. Heller, ___ U.S. ___ , 128 S.Ct. 2783 (2008).

PARTIES TO THE PROCEEDINGS

Petitioner: Joe Diaz. Joe Diaz is the defendant in a criminal case in California.

Respondent: The State of California is prosecuting Petitioner Diaz in the state court.

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PETITION FOR WRIT OF CERTIORARI

Joe Diaz respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the California Court of Appeal, Second Appellate District, Division Eight, entered on May 28, 2008. On June 18, 2008 the Court of Appeal modified its opinion without changing its judgment. On September 10, 2008 the California Supreme Court denied a Petition for Review.

OPINIONS BELOW

The unpublished opinion of the California Court of Appeal, Second Appellate District, Division Eight entered on May 28, 2008 is not reported. It is Appendix A at 1a. The Superior Court of the State of California for the County of Los Angeles denied Petitioner's pretrial motion to suppress evidence and thereafter Petitioner Diaz pleaded guilty with a right to appeal the unpublished, oral decision of the Superior Court denying his motion to suppress evidence. The oral decision of the Superior Court is not reported.

On June 18, 2008 the Court of Appeal, Second Appellate District, Division Eight modified its opinion, but did not change the judgment. The order modifying the opinion is not reported. It is Appendix B at 7a.

The California Supreme Court on September 10, 2008 denied discretionary review in an unpublished and unreported order, Appendix C at 9a.

STATEMENT OF JURISDICTION

The California Court of Appeal, Second Appellate District, Division Eight issued is opinion on May 28, 2008 affirming the judgment of conviction in this case based upon Petitioner's guilty plea after his motion to suppress evidence based upon the Fourth Amendment to the United States Constitution was denied. On June 18, 2008 the Court of Appeal, Second Appellate District, Division Eight modified its decision.

On September 10, 2008 the California Supreme Court denied discretionary review. This Petition for a Writ of Certiorari is filed within 90 days of the denial of the Petition for Review. This Court's jurisdiction is invoked pursuant to 28 U.S.C. Section 1257(a). If the highest court of the state refuses to exercise discretionary jurisdiction then this Court has certiorari jurisdiction to review the decision of the intermediate state appellate court. See Faretta v. California, 422 U.S. 806, 45 L.Ed.2d 562, 95 S.Ct. 2525 (1975), where this Court reversed an unpublished decision of the California Court of Appeal, Second Appellate District after the California Supreme Court denied discretionary review.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution provides as follows:

> "The right of the People to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but

> upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

California Penal Code Section 12021(a)(1) provides, in part, as follows:

> "Any person who has been convicted of a felony under the laws of . . . the State of California . . . and who owns, purchases, receives, or has in his or her possession or under his or her custody or control any firearm is guilty of a felony."

California Penal Code Section 1538.5 provides, in part, as follows:

> "(a)(1) A defendant may move for the return of property or to suppress as evidence any tangible or intangible thing obtained as a result of a search or seizure on either of the following grounds:
>
> (A) The search or seizure without a warrant was unreasonable."

STATEMENT OF THE CASE

Prior to October 20, 2005, Petitioner Joe Diaz ("Diaz") was convicted of a felony. On October 20, 2005 Diaz' motor vehicle was parked on a private driveway of an apartment building which Diaz owned. Diaz, a former Los Angeles Police Officer, got into an argument with someone named Kenneth Jones, outside of Diaz' apartment building. During the

dispute over money Diaz pulled out a small handgun and pointed it at Jones. Diaz also called the police, walked to his parked car on the private driveway, opened his trunk, and put the handgun inside the trunk.

The police arrived in response to Diaz' call, opened the trunk of the vehicle, and found two handguns. The police justified the search based upon probable cause to believe that Diaz had assaulted Jones with a deadly weapon and that there was a gun in the trunk of Diaz' vehicle, which was parked on his private driveway of his apartment building (although he did not live there).

After Diaz was arrested for assault with a deadly weapon and later only charged with possession of handguns by a felon, he moved the Superior Court pursuant to Penal Code Section 1538.5 for an order suppressing evidence on the ground that the search of his vehicle violated the Fourth Amendment. The prosecution conceded that there was no search warrant, no consent by Diaz, and no exigent circumstances. Rather, the prosecution contended that as a matter of law no search warrant is ever needed to search a vehicle when there is probable cause to search the vehicle.[1]

After the Superior Court denied Diaz' motion to suppress the guns, he entered into a plea bargain with

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[1] The probable cause here was extremely thin, almost non existent. It is not a crime to point a gun at someone unless there is no valid reason to do so.

the prosecution that resulted in his plea of guilty to possession of a gun in violation of Penal Code Section 12021(a)(1). Diaz was sentenced to 18 months in prison. Diaz appealed his conviction and was permitted to remain free on bail pending appeal.

California law allows a person who has been convicted of a crime after unsuccessfully moving to suppress evidence to appeal from the conviction even though the conviction was based upon a guilty plea. While he did not argue this point in the trial court, Diaz did argue on appeal that he anticipated that this Court in District of Columbia v. Heller, 554 U.S. ___, 128 S.Ct. 2783 (2008) would find that the possession of a gun is protected by the Second Amendment. At the time the briefs were filed in the Court of Appeal the District of Columbia v. Heller case had not yet been decided.

On June 26, 2007, after the Court of Appeal modified its Opinion but before its Opinion became final as to the Court of Appeal, this Court in a five to four decision struck down a District of Columbia ordinance banning the possession of handguns based upon the Second Amendment. The Court of Appeal below did not reach the Second Amendment issue because it had not been raised in the trial court.

In upholding the search the Court of Appeal below cited California v. Acevedo, 500 U.S. 565, 114 L.Ed.2d 619, 111 S.Ct. 1982 (1991), a case which neither side cited. After Diaz lost in the State Court of Appeal below Diaz sought discretionary review in the California Supreme Court. He specifically raised before the California Supreme Court both the Second

Amendment gun issue as well as the Fourth Amendment search and seizure issue. The California Supreme Court denied discretionary review on September 10, 2008.

REASONS FOR GRANTING THE WRIT

1. Review Should Be Granted To Decide Whether The Police Can Ever Be Required To Obtain A Search Warrant To Search A Vehicle, No Matter What The Circumstances

Recognizing that there apparently is some sort of exception to the search warrant requirement when a motor vehicle is involved, Diaz nevertheless argued below that the so called motor vehicle exception to the warrant requirement is not absolute and that there is still is a residual area of law where the Fourth Amendment would require a search warrant, even to search a motor vehicle. Specifically, Diaz argued below and argues here that although there are a number of cases involving motor vehicles and searches where the courts have dispensed with the search warrant requirement, there still must be one area of law where a search warrant is still required for motor vehicles and that area involves the situation where a privately owned motor vehicle is parked on one's privately owned driveway at a residence, where there is no exigent circumstance, where there is no consent to search, and where nothing would prevent the police officer from obtaining a search warrant. The Fourth Amendment to the United States Constitution provides as follows:

> "The right of the People to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

This Court in Mapp v. Ohio, 367 U.S. 643 (1961) held that evidence seized in violation of the Fourth Amendment cannot be used in state court criminal cases. By virtue of the Fourteenth Amendment to the United States Constitution, the Fourth Amendment applies to the states.

The rights guaranteed by the Fourth Amendment may be exercised by the filing of a motion to suppress evidence pursuant to California Penal Code Section 1538.5.

Penal Code Section 1538.5 provides, in part, as follows:

> "(a)(1) A defendant may move for the return of property or to suppress as evidence any tangible or intangible thing obtained as a result of a search or seizure on either of the following grounds:
>
> > (A) The search or seizure without a warrant was unreasonable."

In his Opening Brief filed with the Court of Appeal Diaz surveyed a number of search and seizure cases

involving automobiles. The first case examined by Diaz was Cady v. Dombrowski, 413 U.S. 433, 93 S.Ct. 2523 (1973). This case involved a defendant whose vehicle was disabled as a result of an accident. The defendant was intoxicated and could not make arrangements to have the vehicle towed and stored. The police seized the vehicle and towed it to a storage facility. The police opened the trunk and seized certain incriminating evidence. This was done without a search warrant. This Court held that the search was legal. This Court did refer to its earlier decision in Preston v. United States, 376 U.S. 364, 84 S.Ct. 881 (1964), where this Court held in that particular case that the search of the automobile violated the Constitution. This Court noted that in the Preston case the search had been conducted after the defendant was under arrest and in custody. Under those circumstances this Court said that the search was not incidental to the arrest.

Establishing that Cady v. Dombrowski, supra, does not apply to this case, we now move to other more recent cases including South Dakota v. Opperman, 428 U.S. 364, 96 S.Ct. 3092 (1976), which held that the Fourth Amendment is not violated when the police conduct a routine inventory search of an automobile lawfully impounded by police for violations of municipal parking ordinances. Obviously the South Dakota v. Opperman case does not assist us in resolving the issue presented by this case. We must again emphasize that this case involves the search of a vehicle parked at Diaz' apartment building. The vehicle was not used for the commission of a crime, there was no search warrant, and no permission to search.

We next examine Arkansas v. Sanders, 442 U.S. 753, 99 S.Ct. 2586 (1979), which involved a police pursuit of a taxicab in which the defendant was riding. A suitcase was removed from the taxicab's trunk and searched. This Court ruled the search was valid but again this case did not involve a parked vehicle on a private driveway. This Court in Arkansas v. Sanders, supra, referred to its earlier decision in Chambers v. Maroney, 399 U.S. 42, 90 S.Ct. 1975 (1970), but that case is not on point. That case involved robbers who had fled the scene of the robbery in a vehicle. The police stopped the vehicle, searched it for guns and stolen money, and then searched vehicle again at the police station. The Chambers v. Maroney case is not a case like the instant one, where a vehicle was searched at a private residence. This Court in Chambers v. Maroney, supra, referred to its earlier decision in Carroll v. United States, 267 U.S. 132, 45 S.Ct. 280 (1925), but that case involved the admissibility of evidence seized in a warrantless search of a vehicle on a highway. The Carroll case did not involve a vehicle at a private residence.

United States v. Ross, 456 U.S. 798, 102 S.Ct. 2157 (1982), was also a vehicle stop case. In the Ross case police officers legitimately stopped an automobile and had probable cause to believe that contraband was concealed somewhere within the vehicle. This Court ruled that the police could conduct a search of the vehicle. This Court stated, 456 U.S. at 806-807, 102 S.Ct. 2163:

> ". . . Given the nature of an automobile in transit, the Court recognized that an immediate intrusion is necessary if police officers are to

> secure the illicit substance. In this class of cases, the court held that a warrantless search of an automobile is not unreason- able."

The quote above was in reference to the earlier decision by the this Court, Carroll v. United States, supra.

California v. Carney, 471 U.S. 386, 105 S.Ct. 2066 (1985) does not apply to this case. In the Carney case this Court stated in the initial paragraph of the opinion:

> "We granted certiorari to decide whether law enforcement agents violated the Fourth Amendment when they conducted a warrantless search, based on probable cause, of a fully mobile 'motor home' located in a public place."

This Court stated at 471 U.S. 392-393, 105 S.Ct. 2070:

> "When a vehicle is being used on the highways, or if it is readily capable of such use and is found stationary in a place not regularly used for residential purposes – temporary or otherwise – the two justifications for the vehicle exception come into play."

Since the Carney case applied to a vehicle "located in a public place" it does not apply to the instant case. Note the phrase, "not regularly used for residential purposes."

We next turn to Colorado v. Bertine, 479 U.S. 367, 107 S.Ct. 738 (1987). This case likewise does not involve the current case before this Court. In Colorado v. Bertine, the defendant was arrested for driving under the influence of alcohol. After he was taken into custody the vehicle was inventoried for the contents. This was done just prior to the arrival of the tow truck. Contraband was found during the inventory search. Again, Colorado v. Bertine does not apply to the instant case, which involves the search of a vehicle parked on a private driveway.

Horton v. California, 496 U.S. 128, 110 S.Ct. 2301 (1990) is only mentioned because it discusses earlier automobile search cases including Coolidge v. New Hampshire, 403 U.S. 443, 91 S.Ct. 2022 (1971). This Court in the Coolidge case reversed a state court murder conviction because, among other things, evidence was seized from the defendant's motor vehicle which had been parked on the defendant's driveway. This Court first ruled that the search warrant that was used was invalid and then rejected the argument that the vehicle was searched incidental to an arrest.

In the course of the Coolidge v. New Hampshire opinion, this Court referred to its earlier decision in Cooper v. California, 386 U.S. 58, 87 S.Ct. 788 (1967), but that case does not assist the prosecution here because that case involved a California statute authorizing the seizure by the police of a vehicle which had been impounded and which was being held in a police garage. The case really involved the forfeiture statute. The California Attorney General even conceded that the search could not be justified as allegedly incidental to an arrest.

Since the issue is narrow - whether the police can dispense with a warrant requirement when searching a vehicle parked on a private driveway there is no reason to deal with cases involving police pursuits of vehicles, the impoundment of vehicles, the location of vehicles parked on public streets, or inventory searches. None of those cases applies to the situation at hand.

At the hearing on the motion to suppress evidence the prosecution relied upon one case, Maryland v. Dyson, 527 U.S. 465, 144 L.Ed.2d, 119 S.Ct. 2013 (1999). With all due respect to the state, that case does not apply. It involved the stopping of a moving vehicle, not a vehicle parked on a private driveway.

This Court referred to its prior decision in Pennsylvania v. LaBron, 518 U.S. 938, 135 L.Ed.2d 1031, 116 S.Ct. 2485 (1996), which involved two search and seizure cases from the Pennsylvania Supreme Court. Of the two cases reviewed by this Court from the Pennsylvania Supreme Court, the one involving defendant Kilgore comes the closest to the factual scenario of the instant case but is not the same case. There is a significant distinction. In the Kilgore case reviewed by this Court in Pennsylvania v. LaBron, supra, this Court pointed out that the drug transaction involved the driving of a pick-up truck which was parked at a farm house. The owner of the farm house where the truck was parked gave permission to search. The opinion is slightly ambiguous as to whether the consent given by the owner of the farm house to search the farm house extended to the vehicle parked at the farm house. This Court pointed out that the pick-up truck was "parked in the driveway of the farm house.

. . ." Pennsylvania v. LaBron, 518 U.S. at 939; 116 S.Ct. at 2486. In the instant case, the property where Diaz' vehicle was parked was Mr. Diaz' property. Diaz certainly did not give consent to search and even if Diaz were not the owner of the property, no owner of the property gave consent to search the property including the vehicle parked on the driveway of the property.

After analyzing the cases above in his Opening Brief filed with the Court of Appeal Diaz then pointed out that there was not one case involving search and seizure law and the search of vehicles without a warrant involving the precise factual scenario of this case - a motor vehicle parked on a private driveway of a private residence owned by the defendant himself. Diaz pointed out that there was never a case holding that no matter what the circumstances a search warrant is never necessary for the search of a vehicle. Diaz argued in his Opening Brief that when a vehicle is parked on one's own private driveway and no consent is given, a search warrant is necessary. Diaz pointed out that there were no cases to the contrary.

The California Attorney General in his Respondent's Brief primarily relied upon federal cases. Diaz in his Appellant's Reply Brief distinguished all of the cases upon which the California Attorney General relied. Before distinguishing those cases Diaz reminded the Court of Appeal that the narrow issue was whether the Fourth Amendment is violated when the police, without benefit of a search warrant, without consent, and without exigent circumstances, search a privately owned vehicle parked on a private driveway of a private residence owned by the defendant.

The Attorney General primarily relied upon two United States Supreme Court decisions, Pennsylvania v. Labron, 518 U.S. 938, 135 L.Ed.2d 1031, 116 S.Ct. 2485 (1996) and Maryland v. Dyson, 527 U.S. 465, 144 L.Ed.2d 442, 119 S.Ct. 2013 (1999).

As Diaz told the California Court of Appeal, Maryland v. Dyson, supra, does not apply because it involved the stopping of a moving motor vehicle, not a vehicle parked in a private driveway. This is the same case upon which the prosecution primarily relied. In this case the Attorney General referred to dictum quoted out of context. Two additional points must be made about the Maryland v. Dyson, supra case. First, it should be noted that the Maryland Court of Special Appeals ruled that the search was unconstitutional. Thus, we have the decision of an intermediate state appellate court in support of the Fourth Amendment. Second, the decision of the Maryland Court of Special Appeals was reviewed by this Court without the benefit of any brief or argument by the defendant in that case who prevailed in the Maryland Court of Special Appeals. The defendant did not file a brief in opposition to the Petition for Writ of Certiorari, did not file a brief on the merits, and did not argue the matter. As Justice Breyer noted in his dissenting opinion (in which Justice Stevens joined), a summary reversal does not decide any new or unanswered questions of law. Accordingly, not only is Maryland v. Dyson, supra, not directly on point, it was not even decided in a traditional adversarial way with both sides appearing and arguing their respective points. While this Court occasionally does reverse lower court decisions summarily, it does so after at least considering some opposition. Apparently Mr.

Dyson, who prevailed in the Maryland Court of Special Appeals, was not represented in this Court because his attorney was not a member of the Bar of this Court.

Diaz concedes that this Court can decide cases without the benefit of considering both sides of the issue and when it does so (which is extremely rare) its decisions would obviously have to be followed by lower courts. However, lower courts are not obligated to follow dictum but only the holding. The "holding" of this Court in Maryland v. Dyson, supra, would only involve a search with respect to a vehicle that was stopped by the police while it was being driven on a public street.

This Court in Maryland v. Dyson, supra, quoted from its earlier decision in Pennsylvania v. Labron, 518 U.S. 938, 135 L.Ed.2d 1031, 116 S.Ct. 2485 (1996), but as Diaz told the Court of Appeal below, the case involved a situation where the owner of the farm house where the truck was parked gave permission to search. In contrast, Diaz did not give consent to search.

With no United States Supreme Court decision right on point, the California Attorney General necessarily shifted to federal appellate court decisions and relied heavily upon two Ninth Circuit decisions, United States v. Hamilton, 792 F.2d 837 (9th Cir. 1986) and United States v. Hatley, 15 F.3d 856 (9th Cir. 1994). The Hamilton case is not really helpful to the State of California here. The Hamilton decision by the Ninth Circuit was a split decision with two of the three judges dissenting with respect to parts of the majority's decision. The case involved a warrantless search of a motor home. The search was primarily

upheld because the District Court concluded that consent was given for the search. Accordingly, the majority upheld the decision of the District Court denying a motion to suppress evidence. After discussing the primary basis for upholding the search the majority of the Ninth Circuit then moved to discuss the issue of whether the so called vehicle exception to the Fourth Amendment would also have justified the search. In suggesting an alternative basis for also upholding the search, the majority in United States v. Hamilton, supra, referred to this Court's decision in California v. Carney, 471 U.S. 386, 85 L.Ed.2d 406, 105 S.Ct. 2066 (1985). But California v. Carney, supra, arguably is limited by its facts. The search and seizure in California v. Carney, supra, involved a public place, not a private driveway. The majority in United States v. Hamilton, supra, even acknowledged this aspect of California v. Carney, supra, that it involved a motor home parked in a public place, not a private driveway.

It is interesting to note that Circuit Judge Hug dissented. Justice Hug stated that he saw "a significance difference in the expectation of privacy in a motor home located in a public parking lot, such as involved in California v. Carney . . . and a motor home located in a private driveway. . . ." United States v. Hamilton, 792 F.2d at 843 (Hug dissenting).

The Ninth Circuit in United States v. Hatley, 15 F.3d 856 (9th Cir. 1994) did hold that a warrantless search can be conducted of a vehicle parked in a private driveway. There was also a consent to search but the District Court did rule that the consent was improperly obtained. The District Court on the

alternative ground that no search warrant was needed to search a car parked in a private driveway upheld the search of the vehicle where 19 ounces of cocaine were found in a closed container. The Ninth Circuit relied upon its earlier decision in United States v. Hamilton, supra. Diaz concedes that the Hatley case is virtually the same as the instant case in terms of the facts. Diaz simply disagrees with the holding in the Hatley case.

Some courts have reached the opposite conclusion or at least have suggested that the so called motor vehicle exception should not apply when the vehicles are parked on private driveways especially driveways of residential property owned by the defendant himself. One of the cases, recognized by the California Attorney General, is United States v. Fields, 456 F.3d 519 (5th Cir. 2006). In the Fields case the defendant sought to have suppressed evidence obtained from his vehicle which was parked on private property. The District Court denied the motion to suppress because the District Court found that the search was conducted incidental to an arrest. The Fifth Circuit upheld the search on this ground. The defendant argued that the automobile exception should not apply because his vehicle was parked on private property. The Fifth Circuit stated, 456 F.3d at 524-525:

> ". . . Thus, we have concluded that automobile exception may not apply when a vehicle is parked at the residence of the criminal defendant challenging the constitutionality of the search...."

The Fifth Circuit referred to its earlier decision in United States v. Sinisterra, 77 F.3d 101, 104-05 (5th Cir. 1996), where the Fifth Circuit then stated :

> "Here, the mall parking lot was not related to anyone's residence."

United States v. Sinisterra, supra, involved the search of a van parked in a mall parking lot open to the public. The Fifth Circuit did conclude in the Sinisterra case that the search was proper. The Fifth Circuit distinguished the Carney case because in the Sinisterra case "the mall parking lot was not related to anyone' residence. . . ."

It is true that in the Fields case the court commented that defendant Fields "did not regularly use the duplex for residential purposes. . . ." The Fifth Circuit was apparently of the view that because defendant Fields did not use his duplex as a residence he might not be protected by the Fourth Amendment but the Court went on to say that the vehicle was not parked in the driveway. Rather, defendant Fields had crashed his car into the side of the building. The Fifth Circuit then stated,

> ". . . The Fourth Amendment concerns that arise when the police search a car that is parked in the driveway of a home, without a warrant, are not present here. . . ." Id. at 525.

Of course, in the instant case, Diaz did not crash his car into the side of his residential property. It was simply parked in the driveway. The California Attorney General argued that it was important for

Diaz to have been the actual resident of the property where his car was parked but that should not be the deciding factor since it is undisputed that the property was residential in nature and that he owned it and that his car was parked on his privately owned driveway. That should be sufficient to warrant Fourth Amendment protection. Otherwise the Courts will get into the complicated issue of actual residency. There should simply be a bright line rule that if the vehicle is parked on a private driveway on property consisting of a residence owned by the defendant then probable cause alone is not sufficient to justify a search of the vehicle.

The Fourth Amendment recognizes the sanctity of private property. Residential property has always been considered to be at the heart of what the Fourth Amendment was designed to protect.

Homes are afforded the maximum protection from warrantless searches and seizures. As the Sixth Circuit noted in United States v. Nelson, 459 F.2d 884, 885 (6th Cir. 1972), "the concept that a man's home is his castle is an ancient one. It has had a profound effect upon our legal history. Its application to the innocent and the guilty, the rich and the poor is not figment of the imagination of modern day judges."

William Pitt, the Earl of Chatham, said,

> "The poorest man may in his cottage bid defiance to all the forces of the Crown. It may be frail; its roof may shake; the wind may blow through it; the storm may enter, the rain may enter; but the King of England cannot enter - all

> his force dares not cross the threshold of the ruined tenement!". Miller v. United States, 357 U.S. 301, 307, 2 L.Ed. 2d 1332 1337, 78 S.Ct. 1190 (1958).

It is undisputed here that it was Diaz' residential property where his vehicle was parked and where it was searched without permission, without a search warrant, and without exigent circumstances. This Court has never authorized searches under such circumstances. It is about time to draw the line here and allow the intrusion into the Fourth Amendment to go no further. We do not want the exception to swallow the rule. This would be a good place to make such a point. This Court has never ruled on this issue. On October 7, 2008 this Court conducted oral argument in Arizona v. Gant, No. 07-542, which also involved a contested search of a vehicle parked in a private driveway. In the Gant case the Arizona Supreme Court held the search and seizure by the Tucson police violated the Fourth Amendment. The police had already arrested Mr. Gant and placed him in the back of the patrol car. The Arizona Supreme Court held that this Court's decision in New York v. Belton, 453 U.S. 454, 69 L.Ed.2d 768, 101 S.Ct. 2860 (1981) did not apply. See State v. Gant, 216 Ariz. 1, 162 P.3d 640 (Ariz. 2007).

This Court granted certiorari, Arizona v. Gant, __ U.S. _____, 128 S.Ct. 1443 (2008) limited to the following question:

> "Does the Fourth Amendment require law enforcement officers to demonstrate a threat to their safety or a need to preserve evidence

related to the crime of arrest in order to justify a warrantless vehicular search incident to arrest conducted after the vehicle's recent occupants have been arrested and secured?

Hopefully for Petitioner Diaz, this Court will affirm the Arizona Supreme Court and stop the movement to eliminate the Fourth Amendment from vehicle search litigation. If the Fourth Amendment is irrelevant when a vehicle is involved, no matter what the situation, this Court should say so. If not, this Court should instruct the lower courts that there are still some circumstances where search warrants must be obtained.

The Court of Appeal below indicated that it understood Diaz' argument that the automobile exception should not apply if a car is parked in a private driveway rather than stopped by the police. See page 3 of Court of Appeal Slip Opinion. The Court of Appeal below then stated that it would not address this issue because the structure in this case was not a private home but rather only an apartment building owned by Diaz and inhabited by others. The Court of Appeal specifically stated that it need not express a view about the relationship, if any, that there may be between the concept of the curtilage around a private home and the search of an automobile located within the curtilage. Diaz respectfully disagrees and states this is an appropriate case to decide this point because if that situation is protected by the Fourth Amendment this also should be protected because courts should not be in the business of determining where a particular home owner or apartment owner lives at any point. For example, if Diaz lived part of

the time in his apartment building would that have made a difference? It should make no difference whether the property owner lives full time in his residence, part of the time in his residence, or none of the time. The rule of law should be the same. If the vehicle is parked on a private driveway of a private residence owned by the defendant that should be sufficient and the Court of Appeal should have reached the underlying issue.

This Court is in a position to rule on the issue and should rule in favor of the Fourth Amendment. The Court of Appeal cited California v. Acevedo, supra, but neither side cited that in any lower court proceedings and the case is not on point.

Like the other cases involving searches of vehicles without search warrants, which Diaz has distinguished from the unique facts of this case, the decision of this Court in California v. Acevedo, 500 U.S. 565, 114 L.Ed.2d 619, 111 S.Ct. 1982 (1991), which neither side cited in this case, but which the Court of Appeal below cited on its own, is likewise distinguishable from the unique facts of this case. The vehicle that was searched in California v. Acevedo without a search warrant was being driven away. The relevant paragraph in the decision of this Court is as follows:

> "At 12:30 P.M., respondent Charles Steven Acevedo arrived. He entered Daza's apartment, stayed for about 10 minutes, and reappeared carrying a brown paper bag that looked full. The officers noticed that the bag was the size of one of the wrapped marijuana packages sent from

> Hawaii. Acevedo walked to a silver Honda in the parking lot. He placed the bag in the trunk of the car and started to drive away. Fearing the loss of evidence, officers in a marked police car stopped him. They opened the trunk and the bag, and found marijuana." Id. at 567, 111 S.Ct. at 1984-1985.

The Acevedo case, therefore, is no different than the numerous other cases cited by the prosecution which did not involve a parked vehicle on a private driveway of a residence owned by the defendant.

Certiorari should be granted to decide whether or not under the facts of this case the warrant requirement of the Fourth Amendment may be ignored. As stated earlier, once it is established that the car was parked on a private driveway owned by the defendant at a residence owned by the defendant, there should be no further inquiry as to whether or not the defendant actually lived at the residence that he owns. That further inquiry only complicates matters and should not be necessary. The rule should simply be that a parked vehicle on a parked driveway of a private residence owned by the defendant requires the obtaining of a warrant, whether or not the defendant himself actually lives at the residence that he owns.

2. Certiorari Should Be Granted To Decide The Constitutionality Of Penal Code Section 12021, Subdivision (a)(1), As Applied To A Convicted Felon For A Non Violent Felony, In Light Of District of Columbia v. Heller, ___ U.S. ___ , 128 S.Ct. 2783 (2008).

While it is true Diaz pleaded guilty to violating Penal Code Section 12021, subdivision (a)(1), he did so on May 8, 2007 and was sentenced on September 5, 2007, the same day he filed his Notice of Appeal. This Court did not grant certiorari in District of Columbia v. Heller, supra, until November 20, 2007, long after Diaz pleaded guilty and two and a half months after he was sentenced and filed his Notice of Appeal. See District of Columbia v. Heller, 552 U.S. ___, 128 S.Ct. 645 (2007). Diaz did have the right to appeal his conviction and the Attorney General does not dispute this. Diaz also seeks to bring before this Court the issue of the Second Amendment because on June 26, 2008, after the Court of Appeal decided this case but prior to its decision becoming final, this Court held that the Second Amendment protects the individual's right to possess firearms. The specific holding of the Unite States Supreme Court was that a local ordinance of the District of Columbia, which prohibited the private possession of a firearm in one's own home, violated the Second Amendment.

Under these circumstances Diaz ought to be able to raise this issue now while his case is still pending on direct appeal. If, in fact, the very penal statute to which Diaz pleaded guilty is unconstitutional then this

Court would have jurisdiction to reverse the judgment of the Court of Appeal and order the case dismissed.

It is true that in Justice Scalia's opinion for the five to four majority in District of Columbia v. Heller Justice Scalia referred to the possession of firearms by felons but the reference to that situation must be considered dictum. Justice Scalia stated,

> ". . . Although we do not undertake an exhaustive historical analysis today of the full scope of the Second Amendment, nothing in our opinion should be taken to cast doubt on long standing prohibitions on the possession of firearms by felons and the mentally ill . . . ."

This dictum should not be construed as supporting a ban on the possession of firearms by all felons but rather felons whose felonies involved acts of violence or other conduct that would make the possession of a firearm by such a felon a problem for the community. There are many felonies that do not involve violence and which should not be used to justify a prohibition upon the possession of a firearm. For example, if a person is convicted of making a false statement to a federal official, as for example Martha Stewart, should such a person be prohibited from possessing a firearm for self defense. The opinion by Justice Scalia in the Second Amendment case recognizes the importance of self defense. Indeed, in this particular case Diaz, a former Los Angeles Police Officer, was found to have the guns in the trunk of his car. As stated, his car was parked on his own private driveway at a residence

owned by him. Should not a person, even if a convicted felon, have the right to self defense.[2]

The rights enumerated in the first ten Amendments to the United States Constitution are important and persons do not forfeit those rights by virtue of certain conduct. For example, the right to a jury trial cannot be forfeited if a person has suffered a prior conviction for jury tampering. If one sells an obscene book does that mean one forfeits his or her right to be protected by the First Amendment with respect to future sales of books. The answer is no.

Likewise, unless one is a dangerous felon (by virtue of a prior conviction involving violence), one should not lose his or her right to self defense. Convicted felons are no more safe in our society than other persons. They should have a right to self defense as any citizen, absent a showing that the particular person should not be trusted with a gun by virtue of prior conduct. To the extent that Penal Code Section 12021, subdivision (a)(1) purports to prohibit all convicted felons from possessing guns, no matter what their convictions, the statute must be considered to be in violation of the Second Amendment, as applied.

This issue is worthy of review by this Court and this case presents this Court with an early opportunity

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[2] While there is some reference to Diaz having previously pointed a gun at someone else, that was not the basis for his conviction, and should not be considered by this Court with respect to the issue of whether Diaz can be convicted of a crime because he happened to possess a gun in the trunk of his vehicle.

to provide its views on the important issue of the Second Amendment.

CONCLUSION

For the foregoing reasons, Petitioner Joe Diaz respectfully asks this Honorable Court to grant his Petition for Writ of Certiorari and reverse the judgment below.

Respectfully submitted,

Roger Jon Diamond
Counsel of Record
2115 Main Street
Santa Monica, CA 90405
(310) 399-3259

Counsel for Petitioner

APPENDIX

APPENDIX A

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLANT DISTRICT

DIVISION EIGHT

No. B202017

Los Angeles County Super. Ct. No. BA292071

[Filed May 28, 2008]

THE PEOPLE,	)
	)
Plaintiff and Respondent,	)
	)
v.	)
	)
JOE DIAZ,	)
	)
Defendant and Appellant.	)
	)

OPINION

APPEAL from a judgment of the Los Angeles County Superior Court. Hank M. Goldberg and Steven R. Van Sicklen, Judges. Affirmed.

Roger Jon Diamond for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Scott A. Taryle and Douglas L. Wilson, Deputy Attorneys General, for Plaintiff and Respondent.

Appellant Joe Diaz was charged with two counts of felon in possession of a firearm (Pen.Code, § 12021, subd. (a)(1) (section 12021(a)(1)), based on two handguns that were found in the trunk of his parked car. The information also alleged two prior felony convictions for the purpose of section 12021 and one prior strike conviction pursuant to the "Three Strikes" law. His motion to suppress evidence pursuant to Penal Code section 1538.5 was denied. Pursuant to a negotiated plea, he pled no contest to the twoprior convictions and the low term of 16 months in prison on one of the section 12021(a)(1) counts. The remaining allegations were dismissed. He was sentenced in accordance with the plea. He appealed. He has been released on bail throughout the trial and appellate proceedings.

Appellant contests both the legality of the search and the constitutionality of section 12021(a)(1). We find no error and affirm.

FACTS AT THE SUPPRESSION HEARING

On October 20, 2005, Police Officer Andrew Gonzalez spoke to a man named Kenneth Jones outside an apartment building. Jones said that, during a verbal dispute with appellant about money,

appellant pulled out a small handgun and pointed it at him. Jones further stated that appellant then called the police on his cell phone, walked to his parked car in the driveway, opened the trunk, and put the handgun inside.

A neighbor told Gonzalez he saw appellant point the handgun at Jones and walk toward the car.

Appellant informed Gonzalez that he was a retired police officer, although he had no credentials with him to prove that. He said he did not live there but owned the apartments as a rental property. He admitted to another officer, Sergeant Humphries, that there were two handguns in the trunk of his car. Gonzalez believed there was probable cause to believe the trunk contained evidence of a felony, assault with a deadly weapon. He searched the trunk and found two firearms inside. Appellant was arrested.

Gonzalez testified during cross-examination that appellant was 30 feet from his car when the officer arrived.

DISCUSSION

1. The Search Issue

Appellant maintains that the warrantless search of his car violated the Fourth Amendment because "the police, without benefit of a search warrant, without consent, and without exigent circumstances, search[ed] a privately owned vehicle parked on a private driveway of a private residence owned by the defendant."

"A defendant may seek further review of the validity of a search or seizure on appeal from a conviction in a criminal case notwithstanding the fact that the judgment of conviction is predicated upon a plea of guilty [or no contest]." (Pen.Code, § 1538.5, subd. (m).)

The trial court denied the Penal Code section 1538.5 motion on the ground that probable cause alone was sufficient, without exigent circumstances, based on the automobile exception to the warrant requirement.

In reviewing that ruling, we utilize the appropriate standard (*People v. Memro* (1995) 11 Cal.4th 786, 846) and apply the federal exclusionary rules for interpreting the Fourth Amendment. (*In re Lance W.* (1985) 37 Cal.3d 873, 896)

The automobile exception permits the warrantless search of a car if there is probable cause to believe the car contains evidence of a crime, even though there are no exigent circumstances that preclude obtaining a search warrant. (*Maryland v. Dyson* (1999) 527 U.S. 465, 466-467; see also *United States v. Ross* (1982) 456 U.S. 798, 825.)

Appellant argues that the exception should not apply if a car is parked in a private driveway rather than stopped by the police.

The protection of the Fourth Amendment extends to the curtilage of a private home, which is the land that surrounds and is associated with the home. (*Oliver v. United States* (1984) 466 U.S. 170, 180

[curtilage is the area to which extends the intimate activity associated with the sanctity of the home and the privacies of life].) We need not address the intersection of the protection afforded to a home and its curtilage, on the one hand, and the automobile exception, on the other. The structure in this case was not a private home but rather an apartment building owned by appellant and inhabited by others. We therefore need not, and do not, express a view about the relationship, if any, that there may be between the concept of the curtilage around a private home and the search of an automobile located within the curtilage.

In this case, the uncontradicted evidence is that the officers were told that appellant had pointed a gun at Jones during a dispute between the two men and that Jones saw appellant put the gun in the trunk of his car, the latter being a fact that appellant's own statement confirmed. By any measure, this constituted probable cause to search the trunk of the car. This is all that was required. (*California v. Acevedo* (1991) 500 U.S. 565, 569.)

We therefore find no error in the denial of appellant's suppression motion.

2. The Constitutionality of Section 12021(a)(1)

Defense counsel recognized below that appellant's no contest plea precluded raising any issue on appeal other than the legality of the search. Even so, in an asserted attempt to preserve the issue, the briefing adds "a long shot argument," which is that appellant's conviction for violating section 12021(a)(1) violates his

Second Amendment right to bear arms.[1] We find that the no contest plea and failure to obtain a certificate of probable cause preclude consideration of this issue. (Pen.Code, § 1237.5; *People v. Buttram* (2003) 30 Cal.4th 773, 780.)[2]

DISPOSITION

The judgment is affirmed.

FLIER, J.

We concur:

COOPER, P.J., and RUBIN, J.

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[1] Section 12021(a)(1) provides: "Any person who has been convicted of a felony under the laws of the ... State of California ... and who owns, purchases, receives, or has in his or her possession or under his or her custody or control any firearm is guilty of a felony."

[2] In a footnote at the end of his reply brief, appellant notes that a petition for writ of certiorari was granted on February 25, 2008, in *Arizona v. Gant*, No. 07-542.The Supreme Court's review will be limited to this question: "Does the Fourth Amendment require law enforcement officers to demonstrate a threat to their safety or a need to preserve evidence related to the crime of arrest in order to justify a warrantless vehicular search incident to arrest conducted after the vehicle's recent occupants have been arrested and secured?"(*Arizona v. Gant* (2008) --- U.S. ---- [128 S.Ct. 1443].) Appellant suggests that we wait to file our opinion until that case is decided. We decline to do so.

APPENDIX B

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA

SECOND APPELLANT DISTRICT

DIVISION EIGHT

No. B202017

Los Angeles County Super. Ct. No. BA292071

[Filed June 18, 2008]

THE PEOPLE,	)
	)
Plaintiff and Respondent,	)
	)
v.	)
	)
JOE DIAZ,	)
	)
Defendant and Appellant.	)
	)

ORDER MODIFYING OPINION
NO CHANGE IN JUDGMENT

Good cause appearing, on the court's own motion, the opinion herein, filed on May 28, 2008, is modified as follows:

The sentence that begins on page 2, line 6 with the words "Pursuant to a negotiated plea, he pled no contest to one of the section 12021(a)(1) counts and admitted the two prior convictions, in exchange for the low term of 16 months in prison."

Modification does not affect the judgment.

/s/ Cooper, P.J.
COOPER, P.J.

/s/ Rubin, J.
RUBIN J.

/s/ Flier, J.
Flier, J.

APPENDIX C

IN THE SUPREME COURT OF CALIFORNIA

No. S164904

Court of Appeal, Second Appellate District, Div. 8 - No. B202017

[Filed September 10, 2008]

THE PEOPLE,	)
	)
Plaintiff and Respondent,	)
	)
v.	)
	)
JOE DIAZ,	)
	)
Defendant and Appellant.	)
	)

EN BANC

The Petition for review is Denied.

GEORGE
Chief Justice